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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

BRIEF FOR PETITIONER

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OPINION BELOW

The Supreme Court of the State of California rendered no opinion in connection with its order, filed on March 22, 1972, denying petitioner's petition for writ of mandate. A copy of its order of denial is set out in the Single Appendix filed herein (p. 38).

JURISDICTION

Petitions for writs of mandate were filed in the Los Angeles Superior Court, California Court of Appeal, 2nd

District, and the Supreme Court of the State of California. Each of said Courts denied said petitions on March 6, 1972, March 9, 1972, and March 22, 1972, respectively.

The constitutional issues were raised consistently in each instance. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; *or the right of the people peaceably to assemble,* and to petition the Government for a redress of grievances." (our emphasis)

The Fourteenth Amendment to the Constitution of the United States, provides in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws.*" (our emphasis)

California Elections Code §§6551, 6552, 6554, 6555, 18602 and 18603 provide in pertinent part as follows:

"6551. All forms required for nomination and election to all congressional, state and county offices shall be furnished only by the country clerk. At the time of issuance of those forms the county clerk shall type in the forms the name of the candidate and the office for which he is a candidate, shall imprint a stamp which reads 'Official Filing Form,' and shall affix his signature. The forms shall be distributed without charge to all candidates applying for them, upon the *prepayment of the filing fees* provided for in Section 6552, 6553 and 6554. The filing fees shall not be refunded in the event the candidate fails to qualify as a candidate. (our emphasis)

"6552. The following fees for filing declarations of candidacy shall be paid to the Secretary of State by each candidate:

"(a) Two percent of the first year salary for the office of United States Senator or for any state office. The fee prescribed in this subdivision does not apply to the office of State Senator or Assemblyman or to an office to be voted for in a district comprising more than one county.

* * * * *

"6554. A filing fee of ten dollars ($10) shall be paid to the county clerk for filing a declaration of candidacy for an office to be voted for wholly within one county with the following exceptions:

* * * * *

"(e) The filing fee to be paid to the county clerk by each candidate for a county office, other than a judicial office and the office of district attorney, shall be the same percentage of the annual salary of

the office as that provided for in subdivision (a) of Section 6552 of this code. This subdivision shall not apply to any candidate for any office for which the annual salary is two thousand five hundred dollars ($2,500) or less. (Amended by Statutes 1969, Chap. 1160.)

"6555. When a person for whom a declaration of candidacy has not been filed is nominated for an office by having his name written on the ballot, he shall pay the same filing fee that would have been required if his declaration had been filed. If he does not pay that fee his name shall not be printed on the ballot at the ensuing general election.

* * * * *

"18602. The declaration required by Section 18601 shall be filed no later than the eighth day prior to the election to which it applies. It shall be filed with the clerks, registrar of voters, or district secretary responsible for the conduct of the election in which the candidate desires to have write-in votes of his name counted. (Amended by Statutes 1970, Chap. 559.)

"18603. No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless

* * * * *

"(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602."

QUESTIONS PRESENTED

Petitioner Donald Paul Lubin filed a class petition for writ of mandate directed to James S. Allison, Registrar-Recorder of the County of Los Angeles in the Supreme

Court of the State of California.[1] Petitioner asked that the Registrar be required to process nomination papers of petitioner and any members of his class in regard to his candidacy to the Board of Supervisors of Los Angeles County without the payment of filing fees as a condition precedent.

The questions thereby arising are:

1. Whether the refusal of the Registrar to permit petitioner and other members of his class to file nomination papers solely because of his inability to pay filing fees in the sum of $701.60 was unconstitutional and beyond the power or jurisdiction of respondent in that the filing fee requirement denies poor people the right to seek public office solely because of their economic station, and deprives poor persons of equal protections of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution.

2. Whether the refusal of the Registrar to permit petitioner and other members of his class to file nomination papers solely because of his inability to pay the filing fees in the sum of $701.60 denies petitioner and members of his class the opportunity to vote for candidates of their choice, depriving him and them of the right of free expression and association for the advancement of political beliefs guaranteed by the First and Fourteenth Amendments of the United States Constitution, as well as equal protections of the laws.

3. Whether the State of California is infringing on basic constitutional rights by providing no alternative to the filing fee requirement.

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[1]Mr. Allison subsequently retired and has been succeeded by the present respondent, Leonard Panish.

4. Whether it is the candidate's indigency or the indigency of his supporting group which is the relevant issue in this case.[2]

STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary manner.

Petitioner Donald Paul Lubin is and at all times mentioned in this petition was a citizen, voter, and candidate for nomination to election to the Board of Supervisors for Los Angeles County who cannot afford the filing fee required for said office, Single Appendix (p. 2).

On or about February 15, 1972, petitioner appeared at the office of James S. Allison, Registrar-Recorder of the County of Los Angeles, to apply for and secure all necessary nomination papers requisite for his candidacy for the Board of Supervisors for Los Angeles County, Single Appendix (pp. 3, 4).

Petitioner demanded that said nomination papers be provided him by said Registrar, but petitioner was refused the issuance of said nomination papers orally and in writing solely because petitioner was unable to pay certain filing fees required by §§6551 and 6554 of the California Elections Code. Said fees are $701.60 for a candidate for Board of Supervisors of Los Angeles County, Single Appendix (p. 4).

On February 17, 1972, petitioner with others filed a petition for writ of mandate against the Secretary of

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[2]The Court on the granting of certiorari requested discussion of this question in addition to those presented in the petition for writ of certiorari.

State and the Los Angeles County Registrar-Recorder in the Los Angeles Superior Court, being case No. C-23138. The suit was filed in their behalf and that of all those similarly situated, being poor persons who wished to run for political office but were unable to pay the filing fees, Single Appendix (p. 5).

Judge John Cole signed an alternative writ of mandate which was set for hearing on March 6, 1972–just four days prior to the filing deadline, Single Appendix (p. 5).

On March 6, 1972, Judge Robert A. Wenke sitting in Department 65 of the Los Angeles Superior Court denied the petition for writ of mandate, Single Appendix (p. 5).

On March 9, 1972, a second petition for writ of mandate was denied by the Court of Appeal, 2d District, Single Appendix (p. 5).

On March 9, 1972, a Federal three-judge Court sitting in San Francisco in the case of *Chote v. Brown*, 342 F. Supp. 1353 (N.D. Cal. 1972) issued a temporary injunction to petitioner Chote enjoining county and state officials from requiring payment of filing fees by indigent candidates for congressional and state offices, Single Appendix (p. 5).

Following that decision, Edmund G. Brown, Secretary of State, notified all county registrars that he would not be collecting filing fees from persons who were indigents, while the case was appealed to this Court, Single Appendix (p. 5).

Respondent Registrar herein accepted filings from indigents in all state and congressional races, but declined to file petitioner's nominating papers without further Court order because it was a local race, Single Appendix (p. 6).

On March 22, 1972, the Supreme Court of the State of California denied a petition for writ of mandate in this case, Single Appendix (p. 38).

On the day this Court granted certiorari herein, it decided *Brown v. Chote*, ____U.S. ___, 41 L.W. 4548 (1973), affirming its judgment and returned the case to the District Court for further proceedings.

SUMMARY OF ARGUMENT

1. California's system of election filing fees violates the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment. The system requires payment of fees of one and two percent of the yearly salary, without alternatives for candidates unable to pay such fees. A similar system in Texas was struck down by this Court in *Bullock v. Carter*, 405 U.S. 134 (1972).

2. The test to be applied to the system of election filing fees is the "compelling interest" test. The rights to vote and to be a candidate are both integral parts of the political process, and are fundamental rights.

3. The rights of the candidate as an individual and a member of a class and as a voter or supporter of a candidate are inseparably linked. Both are relevant to the instant case. Both are entitled to benefit of the Equal Protection of the Laws clause of the Fourteenth Amendment. Under the doctrine of *Turner v. Fouche*, 396 U.S. 346 (1969), once the privilege to run for political office was established, California could not make wealth a condition of running or discriminate against candidates who lacked wealth. California's failure to establish alternatives to paying the filing fee violates the Equal Protection Clause.

4. Both the right to vote and the right to run for office are necessary concomitants of rights protected by the First Amendment, namely, speech, publication and assembly. These rights are made applicable to the states under the Fourteenth Amendment.

5. An election filing fee is in essence a prior restraint on First Amendment rights and therefore should be declared invalid.

ARGUMENT

I.

CALIFORNIA'S FILING FEE REQUIREMENT DENIES POOR PERSONS THE RIGHT TO SEEK PUBLIC OFFICE SOLELY BECAUSE OF THEIR ECONOMIC STATION, AND DEPRIVES POOR PEOPLE OF EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

A. The right to participate in the electoral process is a fundamental right.

The right to vote is one of the most precious and important rights available to people in a democracy, and as such is guaranteed by the United States Constitution. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The Courts have consistently found that the right to vote is included within the category of rights deemed fundamental and necessary. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1885), the Court found it to be a "fundamental political right, because" it is "preservative of all rights." *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Burrey v. Embarcadero Municipal Improvement District*, 5 C.3d 671, 97 Cal. Rptr. 203 (1971).

An important corollary is the right to seek public office. Without meaningful choices of candidates, the right to vote becomes a mere formality. Numerous courts have recognized that this is a fundamental right. *Wong v. Mihaly*, 332 F.Supp. 165 (N.D. Calif. 1971); *Thomas v.*

Mims, 317 F. Supp. 179 (S.D. Ala. 1970); *Jenness v. Little*, 306 F.Supp. 925 (N.D. Ga. 1969); *Fisher v. Taylor*, 196 S.W.2d 217 (S.Ct. Ark. 1946); *Zeilenga v. Nelson*, 4 C.3d 716 (1971); *Camara v. Mellon*, 4 C.3d 714 (1971); *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970). See also *State v. Wilson*, 150 S.E.2d 592 (S.Ct. of App. W.Va. 1966); *Kautenburger v. Jackson*, 333 P.2d 293 (S.Ct. Ariz. 1958); *Williams v. Rhodes*, 393 U.S. 30 (1969).

In *Bullock v. Carter, supra*, this Court indicated that it had not theretofore attached the same fundamental status to candidacies as to voting. But, at page 143, the Court said:

> "However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."

B. Fundamental rights cannot be denied to poor persons solely because of their economic station.

Once it is determined that the right to be a candidate is a fundamental right, any regulations which deny access to public office to a chronically disadvantaged group constitute discrimination and work as a denial of the equal protection of the laws. *Turner v. Fouche*, 396 U.S. 346 (1969). Filing fees which bear no reasonable relationship to the office being sought or the person's qualification therefor constitute a legislative guarantee that a politically voiceless and invisible minority remain in that disadvantaged condition. But even if such filing fees bore a resemblance to reasonableness, if there are no provisions for that group which cannot afford even such "reasonable" fees, there is a denial of equal protection.

Bullock v. Carter, supra. Denied access to seek public office, they are deprived of the ability to use elections and electoral processes as a means of drawing the public's attention to their plight, to the causes which create poverty and the problems that accompany them, and thereby perhaps to solutions. *Hobson v. Hansen*, 269 F. Supp. 401 (D.C. 1967), *aff'd as modified sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

It should be axiomatic that the State cannot prevent candidates from running for office solely because they cannot afford a filing fee. And some cases have so held. *Harper v. Vance*, 342 F. Supp. 136 (Ala. 1972); *Bullock v. Carter, supra; Wong v. Mihaly, supra; Jenness v. Little, supra; Thomas v. Mims, supra; State v. Drexel*, 105 N.W. 175 (Neb. 1905).

In *Thomas v. Mims, supra*, a United States District Court invalidated an Alabama statute requiring a registration fee of two percent of the annual salary for a municipal office, similar to that involved in the instant case. The Court affirmed the right to vote and to seek political office as fundamental rights entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.

A Federal Court in California affirmed the right to file for political office without the payment of fees. In *Wong v. Mihaly*, 332 F. Supp. 165, *supra*, municipal filing fees identical to those in question here were ruled invalid as to poor people. Judge Wollenberg discussed the problem of serious candidates: "The proposition that every serious candidate will be able to pay the fee required cannot be accepted without question. . . . There is, in fact, much to suggest that money and seriousness of candidacy are not always to be found in the same office seeker. On the other hand, it is clear beyond question here that the man

who cannot pay, no matter how serious he is, cannot place his name in nomination."

Bullock v. Carter, supra, involved a Texas system of election fees which were in some instances much higher than California's, but which were also in instances much lower. The one major feature which both systems have in common is that neither State provides alternatives to paying the filing fees in order to qualify for election. As this Court noted in *Bullock, supra,* at page 137, "payment of the filing fee is an absolute prerequisite to a candidate's participation in a primary election. There is no alternative procedure by which a potential candidate who is unable to pay the fee can get on the primary ballot by way of petitioning voters, and write-in votes are not permitted in primary elections for public office. Any person who is willing and able to pay the filing fee and who meets the basic eligibility requirements for holding the office sought can run in a primary" (footnotes omitted).

The Court at page 149 also said: "It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts. By requiring candidates to shoulder the costs of conducting primary elections through filing fees *and* by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice" (emphasis added).

In California, filing fees for all political offices (federal, state and local) are fixed by statute. Generally, they are

fixed at a percentage of the first year's salary for the office sought. The fee for candidates for United States Senator, Governor and other state offices and some county offices, is two percent of the annual salary. Candidates for Representative to Congress, State Senator or Assemblyman, or for judicial office or district attorney, must pay one percent. No filing fee is required of candidates in the presidential primary, or for offices which pay either no fixed salary or not more than $600 annually (California Elections Code §§6551, 6552 and 6554, *supra*). There are no alternatives to the payment of filing fees. In the State of California, if there were no candidates who could afford the filing fees, there would be no elections because even write-in votes cannot be counted without the pre-payment of the filing fees (California Elections Code §18603(b)).

Under the California statutes in effect at the most recent election for office, the required candidate filing fees ranged from $192 for State Assembly, $425 for Congress, $701.60 for Los Angeles County Board of Supervisors, $850 for United States Senator, to $982 for Governor.

The situation described in *Bullock v. Carter, supra,* thus matches that of California.

By focusing upon the factor of one's wealth, the California Code results in blatant, invidious and harmful discrimination upon indigent but otherwise qualified persons who seek elective office. This violates the requirements of equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States. While the State may determine voter qualifications and the manner of elections, it must do so in a manner consistent with the Equal Protection Clause.

Persons cannot be discriminated against because of poverty. *Griffin v. Illinois*, 351 U.S. 12 (1956) (transcripts); *Boddie v. Connecticut*, 401 U.S. 388 (1971) (divorce); *Harper v. Virginia Board of Elections, supra* (poll tax); *Tate v. Short*, 401 U.S. 395 (1970) (parking fines).

In California, the Courts have been cognizant of the principle that persons cannot be discriminated against solely because of the lack of wealth. *In re Fry*, 19 C.A.3d 177 (1971). They have been zealous in protecting the rights of the poor.

In *Ferguson v. Keays*, 4 C.3d 649, 94 Cal. Rptr. 398, 484 P.2d 70 (1970), the California Supreme Court approved in principle the waiver of the $50 fee for filing a record on appeal despite the argument that filing fees defray the cost of courts and discourage unnecessary litigation.

The California Supreme Court has also defined classification based upon wealth as a violation of the Equal Protection Clause in *Serrano v. Priest*, 5 C.3d 584, 96 Cal. Rptr. 601 (1971). At page 597, the Court said: "In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain 'suspect' personal characteristics. One factor which has repeatedly come under close scrutiny of the high court is wealth. 'Lines drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored.' "

In *Burrey v. Embarcadero Municipal Improvement District, supra*, the California Supreme Court declared unconstitutional the denial of voting rights to non-property holders in the election of directors to a municipal district. The Court held at page 679 that a legislative classification which discriminates on the basis

of wealth "can be sustained, if at all, only by the most compelling of state interests."

Burrey, supra, is not inconsistent with the Court's decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage District* (1973), ____ U.S. ____, 41 L.W. 4390. *Burrey* involved a "district with virtually all the powers of a city" (p. 674) and, of course, the instant case involves a governmental body in its pristine form, the Board of Supervisors of the most populous county in the state.

At a time when California and Federal Courts have been steadily broadening the Equal Protection Clause of the Fourteenth Amendment to insure that poor people are not deprived of the benefits of this society, solely because of their lack of wealth, the State of California and County of Los Angeles have refused to extend that protection to one of the most fundamental and important rights available to people in a democracy.

C. The "rational basis" test is not applicable here.

This Court has developed two standards to measure constitutionality within the framework of equal protection of the laws. Under the general standard, sometimes called the "rational basis" test, the Court examines different treatment to see whether the difference has any rational relationship to a legitimate public policy. *Levy v. Louisiana,* 391 U.S. 68 (1968); *McGowan v. Maryland,* 366 U.S. 420 (1961); *Morey v. Doud,* 354 U.S. 457 (1957). On the other hand, in cases involving "suspect classifications" touching upon "fundamental interests and rights," the Court has invoked a much stricter standard. In such cases, the classificaton is considered invidious, and government officials are required to justify

such differences by a "compelling" interest. *Harper v. Virginia Board of Elections, supra; Shapiro v. Thompson,* 394 U.S. 613 (1969); *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 807 (1969); *Levy v. Louisiana, supra; Rinaldi v. Yeager,* 384 U.S. 305 (1966); *Reynolds v. Sims, supra; Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 172-73 (1972); *Chicago Police Dep't v. Mosley,* 408 U.S. 92, 95 (1972). Cf. *Boddie v. Connecticut, supra; Griffin v. Illinois, supra.*

Williams v. Rhodes, supra, enunciates the elements to be weighed to determine whether there is such a compelling interest. The test weighs the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.

This case, like *Bullock v. Carter, supra,* reflects the two elements which the Court has considered crucial in judging the validity of state statutes under the Equal Protection Clause of the Fourteenth Amendment: the legislative classification (1) is "highly suspect" (i.e., based on indigency or poverty), and (2) impinges upon "fundamental constitutional rights" (i.e., voting and political association).

This Court's decision in *United States v. Kraus,* ___ U.S. ___, 41 L.W. 4117 (1973), should not be considered as a retreat from its previous decisions protecting rights of indigents. All that the case held was that the right to discharge in bankruptcy was not a fundamental right akin to free speech and that since there were alternatives available to the bankrupt, the rational justification test sufficed because "bankruptcy legislation is in the area of economics and social welfare." (41 L.W. at 4121). This cannot be said of the issue at bar. The right to vote and

its concomitant right to be a candidate for office can be considered as no other than fundamental, akin, indeed, to free speech.

In light of the major political crises of the country today, political rights afforded to the citizens of the United States must be strengthened, not weakened.

In the instant case, the California Legislature set forth its intentions in collecting fees for nominations in Elections Code §6556 "that the funds deposited in the General Fund pursuant to this section will be used to support the State Commission on Voting Machines and Vote Tabulating Devices to the extent that appropriations are made in the Budget Act from year to year." However, no appropriations have ever been made, and it is obvious that the fees are a mere revenue raising device, Single Appendix (p. 18).

Opposed to the stated purpose are the fundamental rights which are being disadvantaged—namely, the right to vote and the right to be a candidate. Both rights have been established heretofore as vital. California sets up a de facto classification of excluding poor persons solely because of their poverty. The payment of a fee is an absolute condition and therefore the failure to meet it is a disqualification from holding public office.

Thus, the California system has the same infirmities of the Texas system struck down in *Bullock v. Carter, supra.* While the range of fees is not so great, and the fees for some offices not so large, the fees required by the California statutes are more than nominal or minimal, and they produce a similar "disparity in voting power based on wealth." (p. 144) Most importantly, they include *no* alternative to the payment of fees to obtain a place on the ballot. *Bullock v. Carter,* 405 U.S. 134, 149, *supra.*

The costs of campaigning for elective public office are notoriously high, and indeed prohibitive for many prospective candidates otherwise qualified and having substantial popular support. For a poor candidate and his supporters proposing to finance a campaign on a low budget, the requirement of a $701.60 filing fee may make the difference between a candidacy which is viable and one which has no chance at all.

In the June 1972 primary elections in Los Angeles County, H. Steve Luce, a candidate for the Democratic nomination for U.S. Congress, 24th District, who had been allowed to file as an indigent candidate under the temporary injunction issued in *Chote v. Brown, supra,* received, 17,054 votes (34.0% of the total). According to Mr. Luce's sworn statement of receipts and expenditures on file with the Los Angeles County Registrar of Voters, only $178.32 was spent on his campaign—less than half the amount of the $425 filing fee. Absent the *Chote v. Brown, supra,* temporary injunction, the Los Angeles County Registrar-Recorder would have refused to issue Mr. Luce forms on which to secure nomination signatures, refused to print his name on the ballot, and even refused to count write-in votes cast in his behalf.

The impact of the filing fee on exercise of the franchise is thus real, appreciable, and directly related to the resources of the voters supporting a particular candidate. *Bullock v. Carter, supra,* requires that the State make a "showing of necessity" for any impingement. But none is shown.

In *Bullock, supra,* the Court indicated at page 148:

"... It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth. Viewing the

> myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. . . ."

Filing fees as a means of raising revenue are notoriously deficient, weighing the small amount of revenue available to the State as opposed to the very heavy burdens placed upon the individuals who wish to exercise their constitutionally protected rights to vote and run for office.

In *United States v. Texas*, 252 F. Supp. 234, 254, 384 U.S. 155 (1966), the Court discussing the poll tax imposed by the State of Texas said:

> ". . . It is clear, however, that the Legislature and the people may not choose to deny a fundamental constitutional right as a means of collecting revenue. . . . If the State of Texas placed a tax on the right to speak at the rate of one dollar and seventy-five cents per year, no court would hesitate to strike it down as a blatant infringement of the freedom of speech. Yet the poll tax as enforced in Texas is a tax on the equally important right to vote."

At least 22 states, including Arizona, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont and Wisconsin have no primary filing fees. If these states, including some of the largest in the country, do not find it even "necessary" to use elections to collect revenue, it can hardly be argued that California is "compelled" to use this method.

II.

THE RIGHTS OF AN INDIGENT CANDIDATE CANNOT BE SEPARATED FROM THE RIGHTS OF THE INDIGENT COMMUNITY WHICH HE PURPORTS TO REPRESENT.

The Court has requested discussion of whether it is the candidate's indigency or the indigency of his supporting group which is relevant to the instant case.

As this Court noted in *Bullock v. Carter, supra,* at page 143, "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, ... However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."

Realistically, the rights of the candidates and the rights of their constituents, the voters, are integral parts of the political process. A group of voters cannot hope to be successful in attaining representation in government unless they have a candidate for political office. A candidate must have a constituency, must have voters who wish to organize around and vote for him or her.

A. Assuming arguendo, the relevant issue is the indigency of the supporters of the candidate; nevertheless, the filing fee is invalid.

If a candidate cannot pay the filing fee in California, he cannot even be issued nomination papers on which to gather the signatures of his supporters. Although he may have the support of a large number of poor voters, he cannot appear on the ballot unless they are able to raise the amount of the filing fees for him. Obviously, any fees fall more heavily on the poor community.

More affluent persons easily obtain a place on the ballot as well as contributions. The Los Angeles County Registrar-Recorder says: "We do not concede, of course, that a poor person is necessarily unable to obtain the filing fee." (Single Appendix, p. 37) This attitude ignores the realities of life for approximately 25% of the people. It also ignores the spirit of *Adkins v. duPont de Nemours & Co.*, 335 U.S. 331 (1948), in which the Court ruled that a person need not be totally destitute to file in Forma Pauperis. Surely, the same should be true with respect to the rights connected with voting.

Assume that the candidate could collect $1.00 from each of 702 persons in his community to meet the filing fee requirement for Board of Supervisors in Los Angeles County. But then to the extent that these 702 voters have been *required* to contribute funds in order to have their vote recorded for the candidate of their choice, they have been required to pay an indirect poll tax. Such a tax has been proscribed in *United States v. Texas*, 252 F. Supp. 234, 384 U.S. 155, *supra*, and in *Harper v. Virginia Board of Elections*, 383 U.S. 663, *supra*. The main evil of a poll tax was that it made it impossible for the class of citizens more effected to remove the very restriction that disenfranchised them.

This Court explicitly recognized the inequities inherent in this situation in *Bullock v. Carter*, 405 U.S. 134, 144, *supra*:

> "... Not only are voters substantially limited in their choice of candidates, but there is the obvious likelihood of this limitation falling more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, a

> phenomenon which can hardly be rare in light of the size of the fees, it tends to deny some voters the opportunity to vote for a candidate of their choosing; . . . [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status."

Poor people are affected directly by filing fees which substantially limit the choices which are available to them as voters. Candidates who would be most sympathetic to the needs of poor persons would probably come from the poverty community and might have difficulty paying the filing fee. Their inability to do so would eliminate them as choices for poor voters resulting in a deprivation of the opportunity for meaningful representation.

The poverty community is further damaged by the filing fee system of the State of California. All persons in California pay sales taxes of 5% which support in part the electoral process. Unable to pay fees, poor people cannot participate as candidates in the very elections which their taxes have helped finance.

If the indigency of the community is *the* criterion, a system would have to be devised to determine the economic status of the candidate's supporters before he could be permitted to file without payment of the filing fee. A rich man whose constituency could be proved to be poor would be permitted to file without payment of fees. His personal status would not affect rights derived from the community he represents. Other questions would arise, such as, if several candidates claimed to represent the same poverty community, would all be entitled to file without payment of the filing fees? What portion of the constituency would be necessary to indicate support from a poverty community, 5%, 15%, 51%? What percentage of the poverty community would

constitute a portion of the constituency? In the end, the election itself would probably be the best method of determining who the candidates' supporters actually were.

If poor people cannot run candidates from within their own community for lack of resources, then the right to vote and the constitutional guarantees of representation are meaningless. Thus, the right to be a candidate is more than a corollary of the right to vote. It is in fact an integral part of that right.

B. Assuming arguendo, the relevant issue is the indigency of the individual candidate; then perforce the California filing fee requirement must fall.

This Court to date has not attached the same importance to the right of an individual to be a candidate as to the right to vote. *Bullock v. Carter, supra,* p. 143. In *Turner v. Fouche,* 396 U.S. 346, 362, 363, the Court held that once the privilege of holding public office is given, the State may not deny it to some on the basis of distinctions that violate federal constitutional guarantees.

The right to be a candidate is a corollary of the right to vote and an integral part of the political process.

The United States Constitution provides in Articles I and II that legislative and executive power shall reside in elected representatives and an elected president, respectively. Article IV, Section 4 provides "the United States shall guarantee to every State in this Union a Republican Form of Government."

Webster's *Third New International Dictionary,* Unabridged (1968, p. 1928), defines Republic as "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected

officers and representatives responsible to them and governing according to law."

"Representative" is defined as "of, based upon, or constituting a form of government in which the many are represented by persons chosen from among them usually by election."

Inherent within the system of government guaranteed by the United States Constitution are two elements: voters and representatives chosen from said voters.

The right to vote entails more than just the right to cast a ballot. It means the right to vote effectively. *Reynolds v. Sims*, 377 U.S. 533, *supra; Williams v. Rhodes*, 393 U.S. 30, *supra*. To vote effectively means the right to have a real choice of representatives, even to be a candidate yourself. See *Mancuso v. Taft*, 476 F.2d 187, 190 (C.A. 1, 1973).

Although a person's vote is important to him individually, its chief importance lies in its potential for combining with others. It is a part of a political force with the potential power to determine the legislative policies governing his life. *Harper v. Virginia Board of Elections, supra*. If the voter cannot be a candidate or has no choice of a candidate because neither can pay the filing fee, there is no power in the vote.

There is very low voter participation in American elections, consistently the lowest in fact of all democratic countries.[3] Less than 55% of the potentially eligible voters cast ballots in the last presidential election, even though 18 year-olds had been newly enfranchised. The turnout was not considered unusual. For most elections, local as well as national, apathy is especially high among the poor. As an editorial in the *New York Times* on

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[3]*New York Times* editorial, p. 38, December 4, 1972.

December 4, 1972, at page 38, noted: "There is a direct correlation between income and political participation. The poor do not vote in large numbers."

The November 1972 elections in Los Angeles County provide a direct example of this point. According to figures compiled by the Los Angeles County Registrar of Voters and published by the California Secretary of State in his *Report of Registration* booklets for October 1972 and January 1973, the percentage of registered voters dropped from the registration rolls for failure to vote in that general election was 30.3% in the low income 53rd Assembly District of South Central Los Angeles as compared to only 14.3% in the relatively high income 54th Assembly District, including such high income communities as San Marino.

The right to be a candidate has become increasingly important in our society as various groups have begun to demand their rights to full participation in the political mainstream. Women, Blacks, Chicanos, Asian-Americans, Indians, welfare recipients—all are organizing, no longer satisfied with nearly exclusive representation by white middle-class males. Regardless of the sincerity with which these representatives utter statements of concern for the welfare and interests of minority groups, they frequently have little understanding of the conditions, needs and desires of the communities they purport to represent.

The rights of candidates and voters are thus seen to be inseparable. The question of whether the rights of the candidate or the rights of the supporters come first is nearly as indeterminate as the eternal question of the chicken and the egg. You cannot have one without the other. However, if forced to make a choice, then it must be urged that the relevant interest is that of the candidate, both as an individual and as a member of a disadvantaged group.

III.

CALIFORNIA'S FILING FEE REQUIREMENT DENIES POOR PERSONS THE RIGHT TO VOTE FOR CANDIDATES OF THEIR CHOICE, SOLELY BECAUSE OF THEIR ECONOMIC STATION, DEPRIVING THEM OF THE RIGHT OF FREE EXPRESSION AND ASSOCIATION FOR THE ADVANCEMENT OF POLITICAL BELIEFS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AS WELL AS EQUAL PROTECTION OF THE LAWS.

The right to vote and to seek public office are necessary concomitants of the rights protected under the First Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment. Unreasonable restrictions placed upon those rights impinge upon fundamental interests protected by the First Amendment as well as the right of the voters to cast their ballots effectively. *Williams v. Rhodes, supra; Zeilenga v. Nelson*, 4 C.3d 716, *supra; Harper v. Virginia State Board of Elections, supra; Jackson v. Olgilvie*, 325 F. Supp. 864 (1971).

The Court in *Carter v. Wischkaemper*, 321 F. Supp. 1358 (10 N.D. Tex. 1970) said at page 1361:

> "The right to choose one's candidate is not only a fundamental political right protected by the Fourteenth Amendment, it encompasses the First Amendment right to 'associate for the advancement of political beliefs.' "

Campaigns for any political office consist of rallies, campaign speeches by the candidate and his staff, distribution of leaflets. All are First Amendment activities—speech, publication, assembly. The opportunity to campaign is an opportunity to secure public

attention to one's views and to engage other candidates in debate of vital issues.

In *Kelso v. Cook*, 110 N.E. 987, 996 (S.Ct. Ind. 1916), the Court invalidated a filing fee provision requiring one percent of one year's salary to be paid. The Court said:

> "... The provision would compel candidates of minority parties, in counties where they have no hope of election, to contribute the same fee exacted of candidates of majority parties. The emoluments of office are not the chief, or even a leading, object in view in the formation or perpetuation of political parties. It is well recognized, especially in county and city governments, that the minority party often renders greater public service than the majority one. 9 R.C.L. 1082. It often happens that unrighteous policies are overthrown because of the patriotic courage of adherents of minority parties who permit their names to be used as candidates, though they do not desire to hold office. This provision would work serious harm to such public spirited movements."

In *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250-251 (1957), this Court has more recently recognized that political activity can be an important occasion for political persuasion:

> "History has amply proved the virtue of political activity by minority, dissident groups, who innumberable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. The absence of such voices would be a symptom of grave illness in our society."

First Amendment rights are fundamental to the preservation of a democratic society. *Hanover v. Northrup*, 325 F. Supp. 170 (D.C. Conn. 1970). It has been said that they are not absolute and are subject to reasonable

nondiscriminatory regulation governing time, manner and place. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). But once it has been determined that state action impinges upon these rights, the interests of the state must be compelling to justify such interference. *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); *Sweezy v. New Hampshire, supra; Harper v. Virginia Board of Elections, supra; Williams v. Rhodes, supra.*

In the case of *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), this Court indicated that the collection of revenue was a legitimate interest of the state. However, to qualify as *a compelling* state interest, the law must be "necessary, and not merely rationally related to the accomplishment of a permissible state policy."

A filing fee in effect is a prior restraint on First Amendment rights of expression and of association made applicable to the states through the Fourteenth Amendment. Any prior restraint must be viewed with a heavy presumption against its validity. *Organization For A Better Austin v. Keefe*, 399 U.S. 904 (1970); *Carroll v. Princess Anne*, 393 U.S. 175 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

As early as 1905, the Supreme Court of Nebraska struck down its election filing fees in the case of *State v. Drexel*, 105 N.W. 175, *supra*, on the grounds that the filing fee operated as a substantial impairment of the right of the electorate to choose freely its candidates for public office.

First Amendment rights are the crux and cornerstone of American democracy. The peoples' right to engage in wide-open debate, publication and assembly to review the actions of their government and to alter and replace it when necessary, are guaranteed thereby. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

The political process, the acts of running for office, the waging of an active campaign, and the voting for political candidates, must be deemed to be included therein. Political actions are the most direct means of utilizing the First Amendment, made applicable to the states through the Fourteenth Amendment.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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